

No. 14-0135 PO

The Director filed a motion for summary decision on April 15, 2014. We notified McDonald that he should file any response by April 30, 2014. We granted McDonald an extension of time until May 14, 2014, and he filed his suggestions in opposition to the Director's motion on May 5, 2014, whereupon the case became ready for our decision.

Under 1 CSR 15-3.446(5)(A)<sup>1</sup>, we may decide this case in favor of the Director if he establishes facts that entitle the Director to a favorable decision and McDonald does not genuinely dispute. Facts may be established by admissible evidence such as a stipulation, pleading of the adverse party, discovery response of the adverse party, affidavit, or any other evidence admissible under law.<sup>2</sup> The Director's motion is accompanied by an affidavit from his department's custodian of records and by authenticated court records. McDonald submitted an affidavit with his response to the motion.<sup>3</sup> The following facts, based on this admissible evidence, are not in dispute.

### **Findings of Fact**

1. McDonald holds a peace officer license issued by the Director that has remained current and active since June 17, 2004.
2. On December 26, 2012, McDonald was arrested, pending the application for a warrant. The following day he was charged in the Circuit Court of DeKalb County, Missouri with domestic assault in the third degree, in violation of § 565.074, a Class A misdemeanor, and endangering the welfare of a child in violation of § 568.050, a Class A misdemeanor.
3. On May 22, 2013, in the DeKalb County Circuit Court, McDonald pled guilty to peace disturbance in violation of § 574.010, a Class B misdemeanor, and was sentenced to incarceration in the county jail for a term of fourteen days.

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<sup>1</sup> All references to the CSR are to the Missouri Code of State Regulations as current with amendments included in the Missouri Register through the most recent update.

<sup>2</sup> 1 CSR 15-3.446(5)(B).

<sup>3</sup> McDonald also submitted a copy of a document purporting to be an "amended judgment" in his marriage dissolution case, *McDonald v. McDonald*, Case No. 13DK-CC00031 in the Circuit Court of DeKalb County, Missouri. We do not consider the document as admissible evidence because it was not attested to by the court clerk. *See* § 490.130. Statutory references are to RSMo 2000 unless otherwise noted.

4. On October 15, 2013, in the Circuit Court of Andrew County, Missouri, McDonald pled guilty to harassment, in violation of § 565.090.1, a Class A misdemeanor, and was fined \$616.50.

5. On November 15, 2013, in the Circuit Court of DeKalb County, McDonald pled guilty to the Class A misdemeanor of harassment, in violation of § 565.090. The court sentenced McDonald to sixty days' incarceration, but suspended execution of the sentence and placed him on probation for two years.

6. McDonald committed the three criminal acts.

### **Conclusions of Law**

We have jurisdiction to decide this case. Section 590.080.2.<sup>4</sup> The Director has the burden to prove, by a preponderance of the evidence, that McDonald committed an act for which the law allows discipline.<sup>5</sup> A preponderance of the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.”<sup>6</sup>

The Director's complaint alleges there is cause for discipline under § 590.080:

1. The director shall have cause to discipline any peace officer licensee who:

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(2) Has committed any criminal offense, whether or not a criminal charge has been filed[.]

To establish that McDonald committed criminal offenses, the Director relies on certified court records evidencing McDonald's three criminal convictions, twice for harassment and once

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<sup>4</sup> RSMo Supp. 2013.

<sup>5</sup> See *Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012) (dental licensing board demonstrates “cause” to discipline by showing preponderance of evidence).

<sup>6</sup> *Id.* at 230 (quoting *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)).

for peace disturbance.<sup>7</sup> McDonald admits the convictions, but denies having committed the underlying criminal offenses and asserts alternate explanations for his guilty pleas.

In considering the Director's motion for summary decision, we must determine whether the uncontroverted evidence alone is sufficient to establish grounds for discipline. The Director argues McDonald's three guilty pleas are conclusive evidence that he committed criminal offenses, and that he is barred from presenting evidence to the contrary. We agree.

The certified court records submitted by the Director establish that, following guilty pleas, McDonald was found guilty and sentenced – twice for the crime of harassment, and once for the crime of peace disturbance. For the peace disturbance conviction, McDonald was sentenced to fourteen days in jail. The first harassment conviction resulted in a fine, and the second conviction in a sentence of sixty days' incarceration, although execution of the latter sentence was suspended. A period of incarceration is a sentence, as is the imposition of a fine.<sup>8</sup> The imposition of a sentence of confinement in a criminal case, even if execution is suspended,<sup>9</sup> results in a final judgment.<sup>10</sup>

The principle of non-mutual collateral estoppel, as adopted in Missouri, permits the use of a prior judgment to preclude relitigation of an issue, even though the party asserting collateral estoppel was not a party to the prior case.<sup>11</sup> For an issue in the present action to be precluded by the doctrine of collateral estoppel: (1) it must be identical to an issue decided in a prior adjudication; (2) the prior adjudication must have resulted in a judgment on the merits; (3) the party against whom the doctrine is being asserted must have been a party or was in privity with a

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<sup>7</sup> The misdemeanors of harassment and peace disturbance are criminal offenses. *See* § 556.016.3.

<sup>8</sup> Section 557.011.2(1).

<sup>9</sup> *See State v. Nelson*, 9 S.W. 3d 687, 688 (Mo. App. E.D. 1999).

<sup>10</sup> *State v. Williams*, 871 S.W. 2d 450, 452 (Mo. banc1994).

<sup>11</sup> *James v. Paul*, 49 S.W.3d 678, 684 (Mo. banc 2001).

party to the prior adjudication; and (4) the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the prior adjudication.<sup>12</sup>

McDonald's convictions meet these four requirements. First, the Director seeks to establish McDonald committed the very criminal offenses to which he previously pled guilty. Second, the criminal proceedings in the circuit courts of DeKalb County and Andrew County resulted in final judgments on the merits when those courts sentenced McDonald. Third, the party against whom collateral estoppel is being asserted, McDonald, was obviously a party to his prior criminal adjudications. Finally, we find McDonald had a full and fair opportunity to litigate the issue of his guilt in those prior adjudications.

Although a complete transcript of the guilty plea proceedings is not a part of our record, we take official notice that Missouri Supreme Court Rule 24.02 establishes procedures ensuring a guilty plea in every case is voluntary and supported by facts.<sup>13</sup> The certified court records establish that, in each instance, McDonald was represented by counsel and was found guilty. McDonald presented no evidence to rebut the presumption that the courts made the findings required by Rule 24.02 when accepting his guilty pleas. Under these circumstances, we find the principle of non-mutual collateral estoppel precludes McDonald from submitting evidence that he did not commit the criminal offenses to which he pled guilty and was convicted.

We find, therefore, McDonald committed the three criminal offenses to which he pled guilty, was finally adjudicated, and sentenced. McDonald raised no genuine dispute as to these facts that we are obligated to consider. The Director met his burden of proof. Accordingly, we find McDonald is subject to discipline under § 590.080.1(2).

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<sup>12</sup> *In re Caranchini*, 956 S.W.2d 910, 912-13 (Mo. banc 1997) (citations omitted).

<sup>13</sup> Before accepting a guilty plea, the court must personally inquire of the defendant whether his willingness to plead was the result of force or threat, or the result of prior discussions with the prosecutor. Rule 24.02(c). The court is also prohibited from entering a judgment upon a guilty plea unless it first determines there is a factual basis for the plea. Rule 24.02(e).

### **Summary**

There is cause to discipline McDonald's license under § 590.080.1(2). We grant the Director's motion for summary decision and cancel the hearing.

SO ORDERED on May 22, 2014.

*\s\ Mary E. Nelson*  
MARY E. NELSON  
Commissioner